

Before

**James C. Peck, Jr.**  
**Arbitrator**

**In the Matter of Arbitration Between:**

**FRATERNAL ORDER OF POLICE,  
LODGE NO. 5**

**v.**

**AAA Case No. 01-16-0000-6572  
P/O Deric J. Lewis (Terminated)**

**THE CITY OF PHILADELPHIA**

**Hearing Dates: September 28, 2016  
Decision Date: November 10, 2016**

**Appearances:**

For the Union - Marc L. Gelman, Esq., Jennings & Sigmond, P.C.

For the City of Philadelphia - Benjamin Patchen, Esq., City of Philadelphia, Law Department

**Procedural Background**

This arbitration was conducted pursuant to a collective bargaining agreement between the City of Philadelphia, Pennsylvania and Fraternal Order of Police Lodge, No. 5, which is the recognized exclusive collective bargaining representative for a unit of police officers employed by the City of Philadelphia.

The City of Philadelphia and FOP Lodge 5 are parties to a collective bargaining agreement with a term of July 1, 2014 through June 30, 2017.<sup>1</sup> This agreement contains, among other things, a Grievance-Arbitration procedure (Article XXI) culminating in final and binding arbitration under the auspices of the American Arbitration Association.

The instant matter arises from a grievance filed by the Union on January 4, 2016 on behalf of terminated Police Officer Deric J. Lewis, alleging that Officer Lewis had been terminated without just cause.<sup>2</sup> Officer Lewis had received a 30 day suspension with Notice of Intent to Dismiss<sup>3</sup> on January 4, 2016, and a Notice of Dismissal dated January 31, 2016. The Notice of Dismissal alleged that Lewis's had engaged in Conduct Unbecoming of an Officer, Section 1-026010, specifically, "engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than a year."

This grievance was subsequently denied by the City, and when the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of a neutral arbitrator. Subsequently, by letter dated April 21, 2016, the undersigned was appointed arbitrator in this matter.

Pursuant to a Notice of Hearing which issued on May 11, 2016, an evidentiary hearing was conducted on September 28, 2016, at offices of the law firm of Jennings & Sigmond, 1835 Market Street, Suite 2800, Philadelphia, PA 19103. Both parties were represented by counsel, and at hearing were afforded the opportunity to examine and cross-examine witnesses, and to introduce relevant exhibits. The Grievant, Police Officer Deric J. Lewis, was present and participated fully in the proceeding. Both parties made oral arguments on the record.

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<sup>1</sup> See Joint Exhibit 1, in evidence.

<sup>2</sup> See Joint Exhibit 2, received into evidence.

## **Issues**

Did the City of Philadelphia violate the express terms of the collective bargaining agreement by discharging Police Officer Deric J. Lewis without just cause? If the City is found to have violated the terms of the collective bargaining agreement, what is the appropriate remedy?

## **Facts**

As this is a discharge case, the City of Philadelphia has the burden of proof, and was first to present its witnesses at the Hearing before me.

Upper Darby Township Police Officer K [REDACTED] O [REDACTED] credibly testified that on December 28, 2015 he was dispatched to a 911 call at the Grievant's home, and was informed by the dispatcher that it was, "a domestic with a gun". On his way to the scene, Officer O [REDACTED] received further information that the female caller had phoned 911 a second time and reported, "Hurry up! He's going to shoot me!"

Officer O [REDACTED] was the first on the scene, and due to the nature of the call partially unholstered his firearm as he approached the house. He testified that he observed the Grievant outside his house, calmly smoking a cigarette. The Grievant's wife was sitting on a sofa in the living room. Officer O [REDACTED] quickly determined that the house was not in disarray, that there was no gun present, that there were no apparent injuries on either party, and thus he concluded that the 911 call was apparently unwarranted. Officer O [REDACTED] testified that at that point he merely wanted to get the information necessary to complete his report so that he could leave the scene.

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<sup>3</sup> See Exhibit C-1, received into evidence.

However, according to Officer O [REDACTED], while the Grievant was identified as a Philadelphia Police Officer, he refused to provide his name, despite being asked 5-10 times, and became, “combative, aggressive, and argumentative”. Several other Upper Darby Officers had arrived by this time, and Officer O [REDACTED] testified that he heard cursing and yelling, and that he believes that the Grievant may have “poked” one of the other Upper Darby officers.

Upper Darby Officer W [REDACTED] C [REDACTED], who was the second officer on the scene, also testified credibly. He asserted that upon his arrival, the Grievant advised that his service pistol was upstairs, locked in a box. Officer C [REDACTED] testified that he also asked the Grievant his name, and that the Grievant refused to identify himself, and was angry and yelling. Officer C [REDACTED] asserts that he never did get the Grievant’s name.

According to Officer C [REDACTED], he witnessed some “physical contact” between the Grievant and one of the other responding officers, at which time Lt. C [REDACTED], who had also responded, directed that the Grievant be taken into custody. Upon the direction of Lt. C [REDACTED], Officer C [REDACTED] transported the Grievant to the police station and placed him in a holding cell. At the police station the grievant was charged with Simple Assault and two counts of Harassment.

On January 4, 2016 Officer Lewis was the subject of a Philadelphia Police Department Internal Affairs proceeding. That proceeding resulted in Lewis receiving a notice of a 30-day suspension with intent to discharge. On February 1, 2016 Officer Lewis received a Notice of Dismissal with an effective date of January 31, 2016.

At hearing, Philadelphia Police Commissioner Richard Ross testified as to the various considerations leading to the decision to discharge Officer Lewis. Ross testified that Lewis’ failure to properly identify himself to the Upper Darby Police officers, and the fact that Lewis had laid his hands on another police officer were all actions that fell short of the expectations of a Philadelphia Police Officer, and rose in his judgment to the level of “conduct unbecoming of a police officer”. Commissioner Ross also noted that

the Grievant, Officer Lewis, had been discharged previously as a result of a domestic incident, and that Lewis had evidently not learned from his past mistakes.

Finally, Commissioner Ross testified that the available discipline under the contract was either a 30-day suspension, or dismissal, and that given the “totality of the circumstances” he believed that dismissal was the appropriate penalty.

As to the asserted prior discharge of Lewis mentioned by Commissioner Ross, no information concerning such an event was offered into the record by either party. Noted in the Employee Assessment form received into evidence, under the heading “Prior PBI Disciplinary Record” it is indicated that Officer Lewis had been reinstated on November 27, 2010. No further information is provided.

The Union presented a vigorous defense at Hearing. J. [REDACTED] L. [REDACTED], who has been married to the Grievant for four years, testified that there had been several prior visits to the family home by the Upper Darby Police because of noise complaints related to the family swimming pool. However, Ms. L. [REDACTED] denied that she had called the police regarding any domestic dispute on the evening in question.

Ms. L. [REDACTED] described the incident which lead to her husband’s termination, namely the police response to the family home on an alleged domestic call. She admits that her husband refused to give his name to the Upper Darby Police officers, and that he remarked, “I don’t have to give you my name, I don’t want to give you my name. Arrest me now for not giving my name.”

Under cross-examination Ms. L. [REDACTED] admitted that she had been involved in a prior police incident in Philadelphia related to domestic violence, and that she had been previously hospitalized for a shoulder injury she sustained in that domestic violence incident. As a result of this, Ms. L. [REDACTED] had previously obtained a Protection From Abuse Order. But, Ms. L. [REDACTED] asserted that there had been no prior domestic violence calls to the current Upper Darby residence.

Grievant Deric Lewis, Badge Number 9592, testified on his own behalf, and denied that there had been any domestic incident on the evening in question, and asserted that he had no idea who had called the police. Lewis admitted that he refused to give his name to the responding Upper Darby Police Officers because of his concern about how his involvement in a police incident might affect his opportunities for promotion to the rank of Sergeant.

Lewis also admitted that there was a verbal confrontation with one of the Upper Darby officers which turned into a pushing incident between Lewis and the Officer. Lewis admitted that he was immediately arrested and transported to the police station, where he was initially charged with Aggravated Assault and Harassment.

These charges were subsequently reduced to a summary offense, to which Lewis pled guilty and paid a fine of \$236; on the belief that it would allow him to obtain reinstatement to his position as a Philadelphia Police Officer.

No evidence was presented indicating the source of the 911 call setting all of these events into motion.

### **Analysis and Discussion**

Answering a domestic dispute call is one of the most stressful situations that police officers face, and a domestic dispute 911 call which alleges that one of the actors is armed with a gun only serves to make the responding officers even more on edge. During the period of 2010 through 2015, more than 91 police officers nationwide were killed responding to 911 calls for service, and 22% of those slain officers were killed responding to domestic dispute calls. Domestic dispute calls were the single largest

category of calls responsible for officer deaths, followed by general disturbance calls, which resulted in 18% of officer deaths.<sup>4</sup>

For this reason, many police agencies have adopted specific protocols for dealing with domestic disturbances. Specifically in reference to potential domestic violence by police officers, the *International Association of Chiefs of Police, National Law Enforcement Policy Center*, promulgated a Model Policy which was adopted in 2003, which set forth specific procedures that responding officers should follow regarding 911 domestic disturbance calls involving police officers, as either the alleged perpetrator or victim. Among these recommended procedures were the following:

- A. *Communications officers/dispatchers shall be instructed to assign a high priority to all domestic violence calls, including those that involve or appear to involve a police officer of any department.*
- B. *Upon arrival on the scene of a domestic violence call or incident involving a police officer, the primary patrol unit shall immediately notify dispatch and request a supervisor of higher rank than the involved officer report to the scene, regardless of the involved officer's jurisdiction.*
- C. *A supervisor of higher rank shall report to the scene of all police officer domestic violence incidents including a police officer, regardless of the involved officer's jurisdiction.*
- D. *When responding to a domestic violence complaint involving a police officer from another jurisdiction, all responding officers, investigators, and supervisors shall follow the same procedures that are to be followed in responding to a domestic violence complaint involving an officer from their own department.*
- D. *The on-scene supervisor shall notify the chief and the accused officer's immediate supervisor as soon as possible. In the event that the officer is from another jurisdiction, the supervisor shall ensure that the accused officer's chief is notified. All notifications, and attempts to notify, shall be fully documented.*

The Philadelphia Police Department adopted its own policies regarding Off-Duty Police Actions on June 29, 2012, in Directive 10.10.<sup>5</sup> This Directive, which closely

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<sup>4</sup> *Deadly Calls and Fatal Encounters*, Nick Breul and Mike Keith, a study funded jointly by the US Department of Justice , Community Oriented Policing and the National Law Enforcement Officers Memorial Fund, 2015.

tracks the *IACP Model*, requires an off-duty officer who is confronted by any other officer to take the following actions:

1. *Identify yourself verbally as a police officer in your communications with the challenging officer.*
2. *Inform the challenging officer of the exact location of your badge and identification card.*
3. *Produce the identification in a slow, controlled manner without unnecessary movement.*

It would appear that the Upper Darby Police Department followed the *IACP Model* procedures or similar procedures, by dispatching a sufficient number of officers, including a supervisor, to deal with any situation which might arise. Further, the Upper Darby Police Department demonstrated exemplary diligence in quickly determining that the 911 emergency call was unfounded, and that no domestic violence incident had occurred, and that no further action was warranted.

All that remained was the paperwork, and it was at this point that the Grievant displayed the remarkably bad judgement of refusing to identify himself to the Upper Darby Police officers. A verbal dispute followed, and the Grievant further aggravated the situation by putting his hands on one of the Upper Darby Police officers. This lead to the Grievant being taken into custody, arrested, and charged with Assault and Harassment. As noted previously, these charges were subsequently reduced to a Summary Offense, but consistent with the *IACP Model Policy*, a report of this incident was forwarded to the Philadelphia Police Department, which led to the Grievant being terminated.

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<sup>5</sup> See Exhibit C-3, received into evidence.

There simply is no question that Officer Lewis was wrong, and in violation of Philadelphia Police Department Directive 10.10, when he failed to identify himself verbally to the investigating Upper Darby Officers as a police officer, and failed to inform the “challenging officer” of the exact location of his badge and identification card.

In essence, Lewis took an unpleasant situation, i.e. an apparently erroneous complaint of possible domestic abuse involving a gun, and made it worse by his belligerence and lack of cooperation. Lewis’s stated reason for his actions, that he was concerned how a domestic abuse report might affect his opportunity for promotion to the rank of Sergeant, is no excuse for his failure to follow the procedures set forth in Philadelphia Police Department Directive 10.10. Had Lewis followed the mandated department procedure, the evening might well have ended at that point. Instead, Lewis’s combative attitude toward the investigating officers led to his being taken into custody, and ultimately to his discharge.

As stated in the introduction of this Award, the issue to be decided herein is whether the City violated the terms of the collective bargaining agreement by discharging Police Officer Lewis.

The burden of proof in discharge cases has previously been determined by Arbitrators Thomas G. McConnell, Jr. and Alan Symonette as being to a “***beyond a reasonable doubt***” standard. *FOP, Lodge 5 and the City of Philadelphia (Clarke)*, AAA Case No. 14 390 1611 06; *FOP, Lodge 5 and the City of Philadelphia (Kurowski)*, AAA Case No. 14 390 1372 98. In the past, I have utilized this “reasonable doubt” standard, and it is my intention to apply the “***beyond a reasonable doubt***” standard in the instant case.

Black’s Law Dictionary 161 (6<sup>th</sup> ed. 1990) defines “beyond a reasonable doubt” as “...fully satisfied, entirely convinced, satisfied to a moral certainty. This phrase is the equivalent of the words *clear, precise, and indubitable*.

In the instant case, I have no doubt whatsoever that the City has established beyond a reasonable doubt that the Grievant, Officer Lewis, demonstrated a stunning lack of common sense, and also violated Departmental Policy Directive 10.10. The only issue is whether termination is the appropriate punishment for such egregious behavior.

Certain serious acts of misconduct, such as theft, striking a supervisor, serious safety violations, or gross insubordination warrant immediate discharge, without any interim steps. The Employer herein argues that Lewis's misconduct is the equivalent of a conviction of felony or misdemeanor carrying a potential sentence of more than one year, which is punishable by immediate discharge.

I do not view Lewis's misconduct in the same way I would view an intentional violation of Chapter 39 of the Crimes Code (relating to Thefts and Related Offenses). However, Lewis's misconduct was undisputedly more than a minor offense, and warrants significant disciplinary action. Under the terms of the Disciplinary Code, this disciplinary action may be either a 30-day suspension, or summary discharge, which was the discipline imposed by the Police Commissioner in the instant matter.

Discharge is the most extreme industrial penalty, and has been referred to as "industrial capital punishment", or more recently as the equivalent of "permanent exile".<sup>6</sup> While discharge is often viewed as part of a disciplinary continuum, that analysis is certainly not valid in a case like this, where discharge was the first step in the disciplinary progression, and not the last step.

Discharge has the effect of severing an employee where there is no longer any hope of rehabilitation. The sole purpose of discharge is to unburden the Employer from an individual whose conduct has become intolerable. Discharge abolishes the employment relationship, while a disciplinary suspension is designed to improve it.<sup>7</sup>

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<sup>6</sup> Schroeder, "Discharge: Is it Industrial Capital Punishment?" 37 Arb. J. No. 4, 65 (1982).

<sup>7</sup> Red Cross Blood Serv., 90 LA 393, 397 (Dworkin, 1988).

I am unconvinced that Lewis, an otherwise acceptable employee, is beyond redemption and must be cast aside solely because he exercised extremely poor judgment in refusing to identify himself to the Upper Darby Police Officers who visited his home on December 28, 2015, for the purpose of investigating a potential domestic dispute.

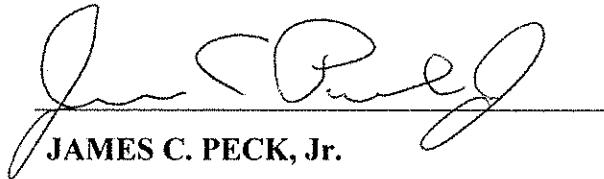
Having determined that Officer Lewis was in violation of departmental code and policy, specifically Directive 10.10, and is deserving of discipline, the only remaining question is whether the imposed penalty of discharge is appropriate, or whether a lesser penalty may be sufficient to impress upon Officer Lewis the seriousness of his misconduct.

I am extremely troubled by Officer Lewis' unprofessional conduct during the events of December 28, 2015. However, I have decided to mitigate Officer Lewis's discharge to a suspension, without back-pay. While I am converting Lewis's termination to a suspension, I am also sending a clear and unequivocal message to Lewis that established Police Department procedures such as Directive 10.10 must in the future be followed.

## **AWARD**

Based on the evidence, and the discussion as set forth above, the undersigned makes the following award:

1. The grievance alleging that the Police Department violated the collective bargaining agreement by discharging Police Officer Deric J. Lewis is hereby **SUSTAINED**, accept as otherwise provided.
2. The City of Philadelphia is hereby directed to reinstate Officer Lewis to his prior position.
3. Officer Lewis' time off is to be treated as a disciplinary suspension without pay.
4. This order directing reinstatement is subject to the application of all usual and customary re-employment requirements and testing procedures, such as fitness for duty physical examinations, screening for drug and alcohol abuse, or screening for anger issues.



**JAMES C. PECK, Jr.**

Arbitrator

Wallingford, Pennsylvania

November 14, 2016